(3)

FILED
FEB 3 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 919

THE FIFTH AVENUE BANK OF NEW YORK, AS TRUSTEE UNDER DECLARATION OF TRUST DATED OCTOBER 28, 1926, WITH HENRY H. WESTINGHOUSE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

FREDERICK L. PEARCE,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	3
Reasons for granting the writ	4
Appendix—Statutes involved	8
Revenue Act of 1934, c. 277, 48 Stat. 983:	
Sec. 113	8
Sec. 117	8

Table of Cases Cited.

Helvering v. *City Bank Farmers Trust Co.*, 296 U. S. 85, 80 L. Ed. 62	4
Helvering v. *Gambrill*, 313 U. S. 11, 85 L. Ed. 1155	5, 6
McFeely v. *Commissioner*, 296 U. S. 102, 80 L. Ed. 83	5
Railroad Commission v. *Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563, 66 L. Ed. 371	4

Statutes Cited.

Act of February 13, 1925, Section 3(b), 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752	1
Revenue Act of 1934:	
Section 117(a)	4
Section 117(c)	4

Other Authority Cited.

78th Annual Report of the Comptroller of the Currency, 1940, p. 142	6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 919

THE FIFTH AVENUE BANK OF NEW YORK, AS TRUSTEE UNDER DECLARATION OF TRUST DATED OCTOBER 28, 1926, WITH HENRY H. WESTINGHOUSE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered on November 3, 1941 (R. 14).

Opinion Below.

The opinion of the Court of Claims (R. 9-13) is reported in 41 F. Supp. 428.

Jurisdiction.

The judgment of the Court of Claims was entered November 3, 1941. Jurisdiction is conferred on this Court by section 3 (b) of the Act of February 13, 1925, 43 Stat. 939, as amended by the Act of May 22, 1939, 53 Stat. 752.

Question Presented.

Whether, under a statute which makes the income-tax-recognizable portion of a gain or loss on the sale of capital assets dependent on the length of time those assets have been held, the holding period of assets acquired by a trust before, but sold by it after, the trust-grantor's death should be computed from the time of acquisition by the trust or from the date of death, the trust being revocable by the grantor up to the time of his death.

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra,* pp. 8-11.

Statement.

The facts found by the Court of Claims (R. 6-8) are summarized briefly as follows:

The plaintiff is acting as trustee under a trust declaration executed in 1926 by the grantor, Henry H. Westinghouse (R. 6). The said Westinghouse until his death in 1933 was cotrustee with the plaintiff, but since that time the plaintiff has been the sole trustee (R. 6).

The trust declaration provided that the trustee or trustees should receive and hold the trust property, pay out the current income to the grantor during his lifetime and after his death to his widow, and upon the termination of the trust on the subsequent death of the widow distribute the corpus to certain individuals and charitable and educational corporations (R. 6). The grantor reserved the power to amend or revoke the trust by an instrument in writing up to the time of his death, at which time it was to become irrevocable, but the trust was never revoked (R. 6).

The grantor transferred certain securities to the trust at its creation in 1926, and from time to time thereafter

(R. 6). The trustees sold certain of the securities and reinvested the proceeds in other securities during the grantor's lifetime (R. 6). None of the trust corpus held by plaintiff as trustee at the time of the grantor's death ever became a part of the grantor's estate for administration by his executors (R. 6-7).

During the calendar year 1934 the plaintiff, as trustee, sold certain securities (capital assets) out of the trust corpus (R. 7). The trustee had acquired legal title to some of these securities by transfer from the grantor in 1927 and 1929, and to others by purchase in 1932 (R. 7). In computing, for income tax purposes, the profit realized on the sale of these securities, the value of the securities at the date of the grantor's death was properly offset against the selling price of these securities (R. 7).

If the period for which the plaintiff held these securities is computed (under section 117 (a) of the Revenue Act of 1934, Appendix, *infra*, pp. 8-9) from the date of the grantor's death in 1933, a higher percentage of the profit upon the sale is subject to tax than if the holding period is computed from the respective earlier dates when the trustee acquired legal title (R. 8). The plaintiff-trustee contended in the Court of Claims that the securities were held, within the meaning of the statute, from and after the earlier dates when it obtained legal title by transfer and purchase (R. 9). The Court of Claims held, to the contrary, that the plaintiff-trustee did not begin to hold the securities, in the statutory sense, until the grantor died, and ordered that the petition be dismissed (R. 12, 14).

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that the period during which the securities in question were held began at the date of the grantor's

death rather than on the respective earlier dates when the plaintiff-trustee acquired legal title.

2. In failing to give judgment for the plaintiff.

Reasons for Granting the Writ.

1. The decision of the Court of Claims is in probable conflict with that line of decisions, exemplified by *Helvering* v. *City Bank Farmers Trust Company, Trustee,* 296 U. S. 85, 80 L. Ed. 62, and *Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, 66 L. Ed. 371, holding that courts are free to construe language, through resort to committee reports or otherwise, only where the meaning is doubtful, and may not interpret a statute contrary to the natural import of its terms, or to create an ambiguity. The pertinent statute [1] provides that the taxable percentage of the gain or loss on the sale of a capital asset should depend, in the case of a taxpayer other than a corporation, on the length of time the asset has been "held" by the taxpayer. The same section makes *explicit* provision for determining that a capital asset is "held" for a period other than the actual period held by the taxpayer in four special situations.[2] The plaintiff taxpayer "held" the securities in question, under any natural import of that word, from the several dates of acquisition as stated in the minority opinion (R. 13). The word "held" does not, as applied to the circumstances of this case, offer any ambiguity, and construction by reference to the conference report, involving another statutory provision, and to other language outside the statutory section under consideration, is, therefore, a departure from the rule of this Court in the cases cited above.

---

[1] Section 117 (a) of the Revenue Act of 1934, Appendix, *infra,* p. 8.

[2] Section 117 (c) of the Revenue Act of 1934, Appendix, *infra,* p. 9.

2. The decision below is contrary to the essence of the decisions of this Court in *McFeely* v. *Commissioner,* 296 U. S. 102, 80 L. Ed. 83, and *Helvering* v. *Gambrill,* 313 U. S. 11, 85 L. Ed. 1155, especially when taken in their conjunctive effect.

In the *McFeely* case, this Court, in considering the holding period under the capital gain and loss provisions of an earlier, but similar, statute, refused "to enlarge or alter the connotation commonly ascribed to the word 'held' "[3] or "to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."[3] The Court decided that the property was held from a date other than the date for determining the basis saying that "Congress, had it desired to change the connotation of the word 'held', * * * could readily have done so."[3]

In the *Gambrill* opinion, this Court concluded, in regard to *purchased* assets, that the period of holding ran from "the date of purchase for property purchased by the trustees." In contrast, the Court of Claims has held, in regard to the securities purchased by the instant trustee in 1932, that the period of holding started at a later date (a "basis" date in 1933). Hence, the decision of the Court of Claims, at least as to the purchased securities, appears to be in conflict with the *Gambrill* decision.

Further, in the *Gambrill* case, this Court held that the holding period of capital assets received by a remainderman from a testamentary trust after an intervening life estate dated back to the testator's death prior to the date for determining the basis of those assets, and that " 'property held by the taxpayer' * * * embraces not only

[3] The quotations from *McFeely* v. *Commissioner,* 296 U. S. 102, appear at pages 108, 111, and 110, respectively.

full ownership but also any interest whether vested, contingent, or conditional."[4]

Taken together, the *McFeely* and *Gambrill* cases mean that the commencement of the holding period is not required to coincide with the date for "basis" purposes unless the statute clearly so specifies; and that the time during which a trust is revocable is not, merely because of revocability, to be excluded from the holding period. The Court of Claims, stating that the *McFeely* and *Gambrill* cases were not controlling since they considered language different from that involved here (R. 12), made the "basis" provisions of the statute and the revocability of the instant trust determinative of the issue. The doubt on this issue, evidenced below in the dissenting opinion (R. 13-14) and, to some extent, in the majority opinion (R. 10-11), is a doubt, not merely as to the correctness of the decision, but as to whether it conflicts with the cited decisions of this Court. That very doubt, in the light of the analysis of those decisions, indicates the probability of a conflict.

3. The question involved is important and the removal of the probable conflict of authority is necessary for the fair and orderly administration of the Federal income tax. The statutory provisions here involved have continued, in effect, so far as the point at issue is concerned, until the present time. There are likely many trusts affected by the decision below. The most recent figures show the total number of trusts administered by national banks alone at 153,902 and the total of such trust assets at $9,345,419,682.[5] While there appear to be no such figures on revocable, as distinguished from irrevocable trusts, the records of the instant petitioner show on November 30,

---

[4] This quotation from *Helvering* v. *Gambrill*, 313 U. S. 11, appears at page 15.

[5] 78th Annual Report of the Comptroller of the Currency, 1940, page 142.

1941, the date of the most recent compilation, 56 revocable trusts, with a capital value of $8,091,000, out of a total of 789 trusts. If this ratio of 56 revocable trusts to 789 total trusts were applied to the foregoing national bank figures, there would be a total of about 10,923 revocable trusts administered by the national banks with a total value of about $663,299,572.81. And when the trusts administered by individuals and fiduciaries other than national banks are considered, the importance of the issue receives added emphasis.

WHEREFORE, it is respectfully submitted that this petition should be granted.

FREDERICK L. PEARCE,
American Security Building,
Washington, D. C.,
Counsel for Petitioner.

Of Counsel:
MORRIS, KIXMILLER & BAAR,
Washington, D. C.

February 3, 1942.